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No. 03-339

IN THE

Supreme Court of the United States

JOSE FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, NATIONAL FRATERNAL ORDER OF POLICE, AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE ALIEN TORT STATUTE IS A PURE JURISDICTIONAL STATUTE THAT DOES NOT CREATE A PRIVATE RIGHT OF ACTION 6

II. THE ALIEN TORT STATUTE DOES NOT APPLY TO THE MODERN CONCEPTION OF INTERNATIONAL HUMAN RIGHTS LAW 9

III. FEDERAL COMMON LAW DOES NOT BY ITS OWN FORCE GIVE RISE TO A FEDERAL TORT CLAIM FOR VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW 13

IV. THE INCORPORATION OF INTERNATIONAL HUMAN RIGHTS NORMS INTO FEDERAL LAW WOULD SERIOUSLY UNDERMINE DOMESTIC FEDERALISM AND SEPARATION OF POWERS 22

CONCLUSION 27

TABLE OF AUTHORITIES

Page

Cases

Al Odah v. United States, 321 F.3d 1134 (D.C. Cir.), *cert. granted*, 124 S. Ct. 534 (2003) 1, 18, 26

Alexander v. Sandoval, 532 U.S. 275 (2001) 19, 20

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 12, 21

Beazley v. Johnson, 242 F.3d 248 (5th Cir. 2001) 25

Bergman v. De Sieyes, 170 F.2d 360 (2d Cir. 1948) 15

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) 23

Boyle v. United Techs. Corp., 487 U.S. 500 (1988) 20

City of Boerne v. Flores, 521 U.S. 507 (1997) 24

D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942) 20

Doe v. Unocal Corp., No. 00-56603, 2002 WL 31063976 (9th Cir. Sept. 18, 2002) 1, 4, 5

Eidman v. Martinez, 184 U.S. 578 (1902) 18

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) 3, 17, 18, 19, 20

Filartiga v. Pena-Irala, 630 F.3d 876 (2d Cir. 1980) ..... *passim*

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Gilbert v. United States, 370 U.S. 650 (1962) 9

TABLE OF AUTHORITIES
(Continued)

Page

Guaranty Trust Co. v. York, 326 U.S. 99 (1945) 19

Hain v. Gibson, 287 F.3d 1224 (10th Cir. 2002), *cert. denied*, 537 U.S. 1173 (2003) 25

Huntington v. Attrill, 146 U.S. 657 (1892) 18, 19

Irving Trust Co. v. Day, 314 U.S. 556 (1942) 19

Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) 4

Ker v. Illinois, 119 U.S. 436 (1886) 14, 15

Kurtz v. Moffitt, 115 U.S. 487 (1885) 18

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 7

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Skiriotes v. Florida, 313 U.S. 69, 73 (1941) 12

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Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) 10, 26

TABLE OF AUTHORITIES
(Continued)

Page

The Nereide, 13 U.S. (9 Cranch) 388 (1815) 16, 17

The Paquete Habana, 175 U.S. 677 (1900) 16, 17

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Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) 8

Transportes Maritimos do Estado v. Almeida, 265 U.S. 104 (1924) 15

United States v. Morrison, 120 S. Ct. 1740 (2000) 24

United States v. Testan, 424 U.S. 392 (1976) 8

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TABLE OF AUTHORITIES
(Continued)

Page

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An Act to establish Judicial Courts of the United States, ch. 20, 1 Stat. 73 (1789) 2, 12, 14

Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992), *reprinted in* 28 U.S.C. § 1350 note (1994) 6, 22

15 U.S.C. § 78aa 8

28 U.S.C. § 1331 ..... 13, 23

28 U.S.C. § 1350 ..... *passim*

42 U.S.C. § 1983 23

5 Op. Att'y Gen. 691 (1802) 16

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TABLE OF AUTHORITIES
(Continued)

Page

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(Continued)

Page

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TABLE OF AUTHORITIES
(Continued)

Page

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INTEREST OF *AMICI CURIAE*[1]

The Washington Legal Foundation ("WLF") is a nonprofit public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to issues involving national security, civil-justice reform and federalism and opposes the expansion of federal-court jurisdiction beyond appropriate statutory and constitutional limits. WLF has appeared as *amicus curiae* in *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 124 S. Ct. 534 (2003), and *Doe v. Unocal Corp.*, No. 00-56603 (9th Cir. dec. pending), to discuss its view that an overly expansive interpretation of 28 U.S.C. § 1350 is inconsistent with congressional intent and threatens to undermine American foreign and domestic policy interests. In addition, WLF has published articles regarding the propriety of litigating foreign claims in U.S. courts. *See, e.g.*, Peter J. Nickles *et al.*, *Court Properly Limits Scope of Alien Tort Claims Act*, 18 Wash. Legal Found., Legal Backgrounder 2 (Jan. 17, 2003); Layne E. Kruse, *Alien Attack: Foreign Environmental Claims Invade American Courts*, 12 Wash. Legal Found., Legal Backgrounder 30 (July 25, 1997).

The National Fraternal Order of Police ("FOP") is the nation's largest law enforcement labor organization, with over 310,000 members. Members of FOP have a strong interest in ensuring that they not be subject to damage suits under 28 U.S.C. § 1350 for claimed violations of

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[1] Counsel for all parties have consented to the filing of this brief, and *amici* have filed those consents with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than the undersigned *amici* and their counsel, has made a monetary contribution to this brief's preparation and submission.

international human rights norms. The Allied Educational Foundation (AEF) is a nonprofit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in the Supreme Court on a number of occasions.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question whether and how "customary international law" is to be incorporated into the domestic law of the United States. Respondent, a Mexican citizen, contends that he may pursue federal-law tort claims for kidnapping and arbitrary detention against Petitioner, also a Mexican citizen, because those acts, at least when conducted by or in complicity with government officials, violate currently accepted international human rights norms. Adopting two differing rationales, several lower courts have agreed that claims for violations of international human rights norms may be brought as federal causes of action in federal court. The Ninth Circuit has sustained such claims, in this case and others, on the theory that a singular provision of the Judiciary Act of 1789, which by its terms defines the jurisdiction of the district courts, was actually meant by Congress to create a federal private right of action.[2] The Second Circuit has sustained such claims, most notably in *Filartiga v. Pena-Irala*, 630 F.3d 876 (2d Cir. 1980), on the theory that, even in the absence of congressional authorization, federal courts have the inherent power and duty to fashion a body of rights and remedies that are based on international human rights norms and enforceable by

[2] *Amici* adopt the nomenclature used by the United States and Petitioner and refer herein to this untitled provision of the Judiciary Act of 1789, *see* An Act to establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, 76-77 (1789), *codified as amended at* 28 U.S.C. § 1350, as the "Alien Tort Statute."

private parties through tort actions arising under "the common law of the United States."

This Court should reject the reasoning of the Second and Ninth Circuits and reverse the decision below for at least four reasons.

First, contrary to the ruling of the Ninth Circuit, the Alien Tort Statute is plainly a mere jurisdictional statute that creates neither substantive federal rights nor a private right of action. *See infra* Part I.

Second, even if the Alien Tort Statute did create a cause of action, the human rights norms invoked by Petitioner here, like those invoked in the vast majority of cases brought under the Alien Tort Statute, are not a part of the "law of nations" as that term is used in the statute and in the Constitution's grant to Congress of the power to define and punish offenses in violation of the law of nations. To the contrary, the body of law referred to as the "law of nations" in the late-eighteenth century applied solely to interstate relations and therefore did not encompass wrongs perpetrated on private citizens by their own governments and countrymen. *See infra* Part II.

Third, contrary to the Second Circuit's holding in *Filartiga*, there is not a self-executing "common law of the United States" pursuant to which the federal courts may create and enforce private rights of action for torts alleged to violate the norms of customary international law. As this Court has repeatedly recognized throughout its history, such transitory common-law torts are, and always have been, questions of local, not federal, law. The Second Circuit's holding to the contrary was premised on that court's misreading of several nineteenth-century Supreme Court cases applying "federal general common law" in a manner that was famously repudiated by this Court in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938). *See infra* Part III.

Fourth, the acceptance by this Court of a judicially enforceable body of international human rights norms would dramatically alter the balance of authority both between the state and federal governments and between the courts and the political branches. In particular, because nothing in the Alien Tort Statute or in the theories set forth by Respondent and the lower courts limits the applicability of international law to foreign actors or foreign conduct, a decision by this Court endorsing one of those theories will necessarily permit future plaintiffs to challenge the practices and policies of the United States, the several States and their respective officers and agents as violative of the norms of customary international law. Because such norms are both more expansive and more indeterminate than the limits on state action set forth in the United States Constitution, the potential for federal-court interference with the prerogatives of the States and the political branches, should the decision below be affirmed, is substantial. *See infra* Part IV.

ARGUMENT

Since the Second Circuit's decision in *Filartiga*, the federal courts, acting in the manner of common-law courts, have been developing an entire body of federal tort law relating to human rights abuses, fleshing out the scope of the federal rights purporting to arise under such law and setting forth a variety of rules relating to ancillary matters such as secondary liability and limitations of actions. *See, e.g., Doe v. Unocal Corp.*, No. 00-56603, 2002 WL 31063976 (9th Cir. Sept. 18, 2002) (vacated pending rehearing en banc); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995). These courts have applied this new federal law to a wide variety of alleged human rights abuses occurring all over the world in cases having no connection at all to the United States. *See, e.g., Kadic*, 70 F.3d at 236-37 (rape, forced prostitution, forced impregnation, torture, and summary execution, carried out by Bosnian-Serb military during Bosnian civil war); *Doe*, 2002 WL 31063976, at *3-*4 (slavery, rape, murder and

torture in connection with Burmese pipeline project); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92-93 (2d Cir. 2002) (imprisonment, torture and murder of political opponents by Nigerian military); *cf.* Elizabeth Amon, *Coming to America: The Alien Tort Claims Act Provides a Legal Forum for the World*, Nat'l L.J., Oct. 23, 2000, at A1, A10 (describing additional cases). In adjudicating these claims of kidnapping, rape, torture, arbitrary detention and other human rights abuses, the lower courts have purported to apply norms derived from "customary international law."

"Customary international law" refers to an unwritten body of norms that "results from a general and consistent practice of states followed by them from a sense of legal obligation." *Restatement (Third) Foreign Relations Law of the United States* § 102(2) (1987). Traditionally viewed as a tool for the resolution of disputes between nations, *see infra* Part II, international law came to be seen in the wake of the Holocaust as including norms designed to protect individual human rights, *i.e.*, the "freedoms, immunities, and benefits which, according to widely accepted contemporary values, every human being should enjoy in the society in which he or she lives." *Id.* § 701, cmt. a. As a body of principles derived from a multitude of sources, including the works of domestic and foreign jurists and commentators, international conventions, decisions of national and transnational tribunals, and the practice of nations, *see Filartiga*, 630 F.2d at 880-81, "customary international law" is not law in the positivist sense. *See generally* Anthony J. Sebok, *Misunderstanding Positivism*, 93 Mich. L. Rev. 2054, 2064-65 (1995) (describing thesis of classical positivism that "every valid legal norm was promulgated by the legal system's sovereign, and the norm's authority can be traced to that sovereign"). But it may obtain the status of positive law, in this nation or others, via what one scholar has called "legal internalization," *i.e.*, the process by which "international norm[s] [are] incorporated into the domestic legal system through executive action, legislative action,

judicial interpretation, or some combination of the three." Harold H. Koh, *How Is International Human Rights Law Enforced?*, 74 Ind. L.J. 1397, 1413 (1999).

In the United States, norms of customary international law cannot have the force of federal law unless and until they are "internalized" by a treaty made by the President with the advice and consent of the Senate, *see* U.S. Const. art. II, § 2, cl. 2, by a statute enacted pursuant to Congress's power to "define and punish . . . Offences against the Law of Nations," *see id.* art. I, § 8, cl. 10,[3] or by a judicial decision. This case presents no question relating to treaties and, although the Alien Tort Statute is an act of Congress, the contention that the statute defines substantive rights does not withstand scrutiny, *see infra* Part I. Rather, this case is about the assumption by some lower courts of the power to incorporate, through judicial fiat, preferred international human rights norms into federal law. This purported power is without legal or historical foundation, *see infra* Parts II-III, and threatens seriously to undermine the appropriate balance of power between the States and the federal government and between the judiciary and the political branches, *see infra* Part IV. It should categorically and definitively be rejected by this Court.

I. THE ALIEN TORT STATUTE IS A PURE JURISDICTIONAL STATUTE THAT DOES NOT CREATE A PRIVATE RIGHT OF ACTION

Petitioner's brief persuasively explains how the text and historical context of the Alien Tort Statute conclusively demonstrate that 28 U.S.C. § 1350 is a jurisdictional statute

[3] An example of Congress's exercise of its Define and Punish Clause power is the Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (1992), *reprinted in* 28 U.S.C. § 1350 note (1994).

that does not create any substantive federal law, let alone a private right of action. That conclusion is buttressed by this Court's numerous statements and holdings on the differences between jurisdictional statutes and statutes creating substantive rights.

"[J]urisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties." *Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994) (internal quotation marks omitted). Therefore, "pure jurisdictional statutes," such as the Alien Tort Statute, "which seek to do nothing more than grant jurisdiction over a particular class of cases cannot support Art. III 'arising under' jurisdiction" because they do not create substantive federal law. *Mesa v. California*, 489 U.S. 121, 136 (1989) (internal quotation marks omitted). Indeed, as this Court has observed, "it would be inconsistent with the plain and ordinary meaning of words, to call a law defining the jurisdiction of certain courts of the United States" an exercise of Congress's Article I powers to create substantive rights and liabilities. *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 452 (1851); *see also Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 249 (1951) ("The Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions.").

This Court has therefore repeatedly and consistently refused to find substantive federal law lurking in the confines of similarly phrased jurisdictional statutes. For example, in rejecting a claim that an admiralty jurisdiction statute, Act of Feb. 26, 1845, ch. 20, 5 Stat. 726, *codified as amended at* 28 U.S.C. § 1873 (2000), represented the congressional creation of substantive federal law pursuant to the Commerce Clause, this Court explained:

> The law . . . contains no regulations of commerce . . . . It merely confers a new jurisdiction on the district courts; and this is its only object and purpose. . . . It is evident . . . that Congress, in passing [the law], did not intend to exercise their power to regulate commerce. . . . [T]he jurisdiction to administer the existing laws upon these subjects is certainly not a regulation within the meaning of the Constitution.

The Propeller Genesee Chief, 53 U.S. (12 How.) at 451-52.

Similarly, this Court has rejected the argument that substantive federal law is created by § 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, which provides (in language paralleling that of the Alien Tort Statute) that "[t]he district courts of the United States . . . shall have exclusive jurisdiction of violations of" the federal securities laws. The Court stated:

> Section 27 grants jurisdiction to the federal courts and provides for venue and service of process. It creates no cause of action of its own force and effect; it imposes no liabilities. The source of plaintiffs' rights must be found, if at all, in the substantive provisions of the [law] which they seek to enforce, not in the jurisdictional provision.

Touche Ross & Co. v. Redington, 442 U.S. 560, 577 (1979).

And this Court has held that the similarly worded Tucker Act, 28 U.S.C. § 1491(a)(1), which gives the Court of Federal Claims "jurisdiction to render judgment upon any claim against the United States" is "only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages." *United States v. Testan*, 424 U.S. 392, 398 (1976). Rather, the Tucker Act merely "confers jurisdiction upon [the Court of Claims] whenever the substantive right exists." *Id.*

So, too, the Alien Tort Statute grants jurisdiction, but does not create substantive federal law. Respondent therefore has no causes of action under the Alien Tort Statute for kidnapping, arbitrary detention or any other tort.

II. THE ALIEN TORT STATUTE DOES NOT APPLY TO THE MODERN CONCEPTION OF INTERNATIONAL HUMAN RIGHTS LAW

Even if the Alien Tort Statute somehow did create or authorize the creation of substantive federal law relating to "the law of nations," such law would not extend to the international human rights norms invoked here or in most of the cases, *see supra* pp. 4-5, brought under the Alien Tort Statute.

To determine whether a particular claim falls within the Alien Tort Statute, the Court must first determine the meaning that the statutory phrase "law of nations" had when the statute was enacted in 1789. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 759 (1980) (in construing the meaning of a statutory term, Court "look[s] to the contemporaneous understanding of the term"); *Gilbert v. United States*, 370 U.S. 650, 655 (1962) ("[I]n the absence of anything to the contrary it is fair to assume that Congress use[s a] word in [a] statute in its common-law sense."). Unlike the modern conception of international law, which seeks to protect private individuals from human rights abuses at the hands of their own governments and countrymen, *see supra* p. 5, the body of law referred to as "the law of nations" in the late-eighteenth century applied solely to interstate relations. As explained by Emmerich de Vattel, a natural law theorist with significant influence on the Founding generation, *see U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 462 n.12 (1978), "[t]he Law of Nations is the science which teaches the rights subsisting between nations or states, and the obligations correspondent to those rights." Emmerich de Vattel, *The Law of Nations* § 3 (Joseph Chitty

ed. & trans., Phila., T. & J.W. Johnson & Co. new ed. 1853) (1758); *see also* 1 James Kent, *Commentaries* *1 (defining the law of nations as "that code of public instruction which defines the rights and prescribes the duties of nations in their intercourse with each other"); Justice James Iredell, Charge to the Grand Jury for the District of South Carolina (May 12, 1794), *reprinted in Gazette of the United States* (Philadelphia), June 12, 1794 (describing the law of nations as the means "by which alone all controversies between nation and nation can be determined"), *quoted in* Douglas J. Sylvester, *International Law As Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 N.Y.U. J. Int'l L. & Pol. 1, 58 (1999). *See generally* Michael T. Morley, Note, *The Law of Nations and the Offenses Clause of the Constitution: A Defense of Federalism*, 112 Yale L.J. 109, 122-31 (2002) (discussing similar views of other influential Founding-era scholars and writers).

This is not to say that individuals could never have rights and obligations under the law of nations. Eighteenth-century courts applied the law of nations (as general common law, *see infra* Part III) to matters where the conduct of private citizens touched upon relations between nations, such as where one nation's citizens or residents injured or affronted the dignity of another nation or its officers or citizens. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 813-14 (D.C. Cir. 1984) (Bork, J., concurring); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461, 475-80 (1989); John M. Rogers, *The Alien Tort Statute and How Individuals 'Violate' International Law*, 21 Vand. J. Transnat'l L. 47, 49-50 (1988). Blackstone provided examples of such matters, noting that "[t]he principal offences against the law of nations . . . are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of embassadors; and, 3. Piracy." 4 William Blackstone, *Commentaries* *68. Another area in which the law of nations regulated the conduct of private individuals was the field of prize,

whereby warring nations (and their citizens) captured enemy merchant vessels. *See* Joseph M. Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 Hastings Int'l & Comp. L. Rev. 445, 451-67 (1995). Significantly, however, because the rights and duties of individuals under international law stemmed from obligations between nations, violations of the law of nations could not arise out human rights abuses perpetrated against an individual by his own government or countrymen within his own country.

The United States' treatment of these issues prior to and just after the adoption of the Constitution is consistent with this understanding of the law of nations. In 1781, for example, the Continental Congress, itself lacking the necessary regulatory authority, passed a resolution recommending that the States enact laws to punish "infractions of the laws of nations." 21 *Journals of the Continental Congress 1774—1789*, at 1136 (Gov't Printing Office 1912). The resolution singled out, as the "most obvious" subjects of such legislation, violations of safe-conducts and passports granted by Congress to foreign subjects in times of war, acts of hostility against those in amity with the United States, infractions of the immunities of ambassadors and other public ministers, and treaty violations. *Id.* at 1136-37. The resolution also recommended that the States create civil remedies for "injur[ies] done to a foreign power by a citizen." *Id.* at 1137. A decade later, the newly empowered First Congress was able to rely on the Define and Punish Clause, *see supra* p. 6 & note 3, to criminalize violations of safe-conducts and passports and affronts to and assaults on ambassadors and other public ministers. *See* An Act for the Punishment of

certain Crimes against the United States, ch. IX, §§ 25-28, 1 Stat. 112, 117-18 (1790).[4]

This general understanding that international law did not govern a nation's domestic affairs continued, moreover, well into the twentieth century. *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 422 (1964) (describing the "peculiar nation-to-nation character" of international law and noting that "[t]he traditional view of international law is that it establishes substantive principles for determining whether one country has wronged another"); *Skiriotes v. Florida*, 313 U.S. 69, 73 (1941) (explaining that principles of international law "are concerned with international rights and duties and not with domestic rights and duties"); *cf. Sabbatino*, 376 U.S. at 423 ("the public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders").

It is clear, therefore, that when Congress enacted the Alien Tort Statute in 1789, the statutory phrase "tort only committed in violation of the law of nations" was understood to extend only to torts touching upon the United States' relations with other nations (such as a violation of a safe-conduct or an assault, by a U.S. citizen or occurring in the

[4] Historians have pointed to the Marbois Affair of 1784, in which Counsel General Marbois, a French diplomat, was assaulted in Philadelphia, as illustrative of the concerns underlying the decision to vest the federal courts with jurisdiction over civil actions involving violations of the law of nations. *See* Aric K. Short, *Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation*, 33 N.Y.U. J. Int'l L. & Politics 1001, 1008-09 & n.29 (2001). The inability of the national government directly to address the Marbois incident, and others like it, prompted the enactment of both the Constitution's grant of federal-court jurisdiction over "Cases affecting Ambassadors [and] other public Ministers and Consuls," U.S. Const. art. III, § 2, and its statutory complement, the Alien Tort Statute. *See* Short, *supra*, at 1009.

United States, on a foreign diplomat). It did *not*, however, apply to human rights abuses perpetrated against individuals by their own governments or countrymen within their own nations. Even if it were more than a pure jurisdictional statue, therefore, the Alien Tort Statute would not reach the conduct alleged here and in the typical modern lawsuit brought under the statute.

III. FEDERAL COMMON LAW DOES NOT BY ITS OWN FORCE GIVE RISE TO A FEDERAL TORT CLAIM FOR VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW

Even *Filartiga*, the progenitor of alien-tort litigation, recognized that the Alien Tort Statute was a pure jurisdictional statute that did not create a cause of action. *See Filartiga*, 630 F.2d at 887 (noting that the Alien Tort Statute does "not . . . grant[] new rights to aliens" but provides jurisdiction over "rights already recognized"). In holding that the plaintiff in that case had nevertheless raised a federal claim, the Second Circuit concluded that claims for violations of international human rights norms — even where those norms had not been codified into a domestic enactment such as a federal statute or treaty — existed as part of "the common law of the United States." 630 F.2d at 885-87. The Alien Tort Statute, in the Second Circuit's view, was simply a jurisdictional conduit pursuant to which such pre-existing claims could be brought in federal court. *See id.*[5]

[5] The Second Circuit has yet to address the logical consequence of its conclusion: if claimed violations of international human rights law really do arise under "the common law of the United States," then reliance on the Alien Tort Statute for jurisdiction over such claims is redundant now that Congress has granted the federal courts general federal-question jurisdiction, *see* 28 U.S.C. § 1331.

Contrary to *Filartiga*, however, this Court has held, on numerous occasions, that a claimed violation of an international-law norm that has not been codified in a federal treaty or statute does not present a federal question or arise under federal law. *New York Life Insurance Co. v. Hendren*, 92 U.S. 286 (1875), is instructive. There, a Virginia widow had sued a New York insurance company in state court to recover the proceeds of a life insurance policy. One of the issues in the state-court proceeding was the effect, under "the general laws of war, as recognized by the law of nations applicable to th[e] case," of the Civil War upon the life insurance contract. *Id.* at 286. This Court dismissed the writ of error for want of federal-question jurisdiction,[6] explaining that the appeal, although arising under the law of nations, "present[ed] questions of general law alone" and therefore did not "show that any Federal question was decided or necessarily involved in the judgment rendered by the court below." *Id.*

This Court reiterated its holding that claimed violations of uncodified international law do not present a federal question in *Ker v. Illinois*, 119 U.S. 436 (1886), a case involving facts similar to those at issue here. In *Ker*, an individual acting as an agent of the United States government traveled to Peru, where, without the authorization of the Peruvian government, he kidnapped, detained and forcibly transferred a fugitive to Illinois to stand trial. *Id.* at 438, 442-43. The state court rejected defendant's argument that the kidnapping and detention required dismissal of the indictment, and the

[6] At the time, this Court's appellate jurisdiction over decisions of state courts was defined by § 25 of the Judiciary Act of 1789 and limited to federal questions. *See* An Act to establish the Judicial Courts of the United States, ch. 20, § 25, 1 Stat. 73, 85-87 (1789) (as amended); 16B Charles A. Wright *et al.*, *Federal Practice and Procedure: Jurisdiction* § 4006 & nn.1-3 (1996).

defendant sought a writ error from this Court. *Id.* at 438-39. After rejecting on the merits arguments that the forcible abduction violated the Fourteenth Amendment and a treaty between the United States and Peru, this Court held that it otherwise could not review the defendant's claim that his forcible extradition from a foreign jurisdiction barred his trial. *Id.* at 444. This was so, the Court explained, because the question was "a question of common law, or of the law of nations," that was "within the province of the State court" and that this Court therefore had "no right to review." *Id.*

Even foreign sovereign immunity, a quintessential part of the law of nations, raised a non-federal question before that doctrine was codified as federal law by the political branches. *See, e.g.*, *Transportes Maritimos do Estado v. Almeida*, 265 U.S. 104, 105 (1924) (holding that a "claim of [foreign] sovereign immunity does not present a question of federal jurisdiction"); *Oliver Am. Trading Co. v. Mexico*, 264 U.S. 440, 442-43 (1924) (explaining that "[t]he question of sovereign immunity is such a question of general law, applicable as fully to suits in the state courts as to those prosecuted in the courts of the United States" and holding that the Court therefore lacked federal-question jurisdiction to review the writ of error); *Wulfsohn v. Russian Socialist Federated Soviet Republic*, 266 U.S. 580 (1924) (per curiam) (dismissing appeal raising issue of foreign sovereign immunity "for the want of jurisdiction"). Indeed, the view that international law generally did not raise issues of federal law prevailed well into the twentieth century. *See, e.g.*, *Bergman v. De Sieyes*, 170 F.2d 360, 361 (2d Cir. 1948) (L. Hand, C.J.) ("although the courts of [New York] look to international law as a source of New York law, their interpretation of international law is controlling upon us, and we are to follow them so far as they have declared themselves").

Moreover, these judicial decisions were in accord with the formal opinion of Attorney General Levi Lincoln, expressed

shortly after the passage of the Alien Tort Statute. Writing to the Secretary of State about an assault by U.S. citizens on a Spanish minister, the Attorney General observed that the act was "an aggravated violation of the law of nations," but that there was no federal remedy given the absence of a congressional "statute recognizing the offence." 5 Op. Att'y Gen. 691, 692 (1802). This was so, the Attorney General explained, because "[t]he law of nations is considered as a part of the municipal law of each State." *Id.*

In short, the historical record is quite clear: from the Founding until the decision in *Filartiga*, claimed violations of international law were treated just as any other transitory common-law tort claims: as non-federal claims that could only be litigated in federal court if jurisdiction was otherwise proper. That *Filartiga* represented a sharp break from this historical understanding is highlighted by a comparison of the reasoning of *Filartiga* with the dissenting opinion in *New York Life*, where Justice Bradley was alone among the Justices in contending — just as the Second Circuit would assert more than 100 years later — that claims based on "unwritten international law" arose under the "laws of the United States." 92 U.S. at 288 (Bradley, J., dissenting).

In reaching its conclusion, the Second Circuit, which failed to cite any of these authorities, made the crucial analytical mistake of taking out of context statements by this Court that international law is "part of our law" and "part of the law of the land." 630 F.2d at 887 (quoting *The Nereide*, 13 U.S. (9 Cranch) 388, 422 (1815), and *The Paquete Habana*, 175 U.S. 677, 700 (1900)). Respondent echoed this language in his opposition to the *certiorari* petition, arguing that substantive rights under the law of nations "already existed in American law by virtue of the incorporation of the law of nations into the common law of the United States"; that "torts in violation of the law of nations would be cognizable at common law, just as any other tort would be"; and that "this Court approved the application of customary

international law in U.S. courts even in the absence of positive Congressional enactment." Resp. Cert. Opp. at 13-15 & n.8 (citing, *inter alia*, *The Nereide* and *The Paquete Habana*).

When viewed in their proper context, however, the Court's *dicta* in *The Nereide* and *The Paquete Habana*, are fully consistent with the authorities discussed above. These cases — both of which were before this Court as part of its statutory admiralty jurisdiction, *see The Paquete Habana*, 175 U.S. at 680-85; *The Nereide*, 13 U.S. (9 Cranch) at 388-91 — were decided prior to the seminal decision in *Erie Railroad Co. v. Tompkins*, in which this Court famously pronounced that "[t]here is no federal general common law." 304 U.S. at 78. Prior to *Erie*, the federal courts applied their own independent rules of decision to transitory common-law claims. *See, e.g., Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18-19 (1842); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 Harv. L. Rev. 1513, 1517-27 (1984) (describing the Founding era view of the "general common law"). These federal-court decisions on matters of "general law" did not create or apply federal law. *See Erie*, 304 U.S. at 74-75 (explaining that "general law" was not binding on the States); Fletcher, *supra*, at 1517-18, 1521-25, 1558-62 (explaining the early American understanding of "[t]he general common law" as "nonfederal law"); *cf. Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 658 (1834) ("It is clear, there can be no common law of the United States. . . . There is no principle which pervades the union and has the authority of law, that is not embodied in the constitution or laws of the union. The common law could be made a part of our federal system, only by legislative adoption."). To a modern eye, however, these pre-*Erie* decisions could be — and to the *Filartiga* court were — misinterpreted as endorsing the view that certain aspects of the common law, such as international law, were federalized. To the contrary, international law was simply a part of this "general common law" and, in that

respect, was no different than the law of contracts and the law of torts: all were "part of our law" and of the "law of the land." *See, e.g.*, *Kurtz v. Moffitt*, 115 U.S. 487, 498 (1885) (describing the common law of England as "part of our law"); *Eidman v. Martinez*, 184 U.S. 578, 591 (1902) ("[w]hen we speak of *our* laws we mean to be understood as referring to our own statutory laws or the common law we inherited from the mother country" (emphasis in original)); 4 William Blackstone, *Commentaries* *67 (explaining that "the law of nations . . . is [in England] adopted in its full extent by the common law, and is held to be a part of the law of the land").[7]

This pre-*Erie* understanding of international law was specifically addressed by this Court in *Huntington v. Attrill*, 146 U.S. 657 (1892). The issue there was whether the Maryland state courts were required to give full faith and credit to a judgment rendered under a New York law, which required a determination whether the New York law was penal in nature. This Court characterized the question as one of "international law" and described the domestic status of such law in a manner reflecting a quintessential example of the pre-*Erie* understanding of the common law:

> In this country, the question of international law must be determined in the first instance by the court, state or national, in which the suit is brought. If the suit is brought in a Circuit Court of the United States, it is one

[7] *Filartiga*'s conceptual misstep is criticized in depth in Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815 (1997). *See also Al Odah*, 321 F.3d 1147-48 (Randolph, J., concurring); Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 Harv. L. Rev. 2260 (1998); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 Vand. L. Rev. 1205 (1988).

> of those questions of general jurisprudence which that court must decide for itself, uncontrolled by local decisions. . . . If a suit . . . is brought in a court of another State, the Constitution and laws of the United States have not authorized its decision upon such a question to be reviewed by this court.

Huntington, 146 U.S. at 683 (citing *New York Life*).[8]

Erie, however, expressly disavowed the two major premises on which nineteenth-century jurisprudence was — and *Filartiga* is — based. *First*, this Court rejected the idea that the federal courts can apply law not derived from a sovereign source, noting that "law in the sense in which courts speak of it today does not exist without some definite authority behind it." *Erie*, 304 U.S. at 79 (internal quotation marks omitted). *Second*, the Supreme Court rejected the legal fiction that courts "discover" common law rules, explaining that the common law "is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject" and noting that under the Constitution, the federal courts lack this general common-lawmaking power. *Id.* at 78 (internal quotation marks omitted); *see also Guaranty Trust Co. v. York*, 326 U.S. 99, 101-02 (1945) ("[*Erie*] overruled a particular way of looking at law"); *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) ("Raising up causes of action where a

[8] In *Huntington*, the Court ultimately applied federal law to the question presented, but did so only because that issue was part of an inquiry under the Full Faith and Credit Clause of the Constitution. The Court explained that its decision to apply federal law was "analogous" to the situation where federal law controls the interpretation of contracts in matters arising under the Constitution's Contracts Clause. *Id.* at 684; *see also Irving Trust Co. v. Day*, 314 U.S. 556, 561 (1942) ("When this Court is asked to invalidate a state statute upon the ground that it impairs the obligation of a contract, the existence of the contract and the nature and extent of its obligation become federal questions . . . .").

statute has not created them may be a proper function for common-law courts, but not for federal tribunals." (internal quotation marks omitted)). *Filartiga* rests precisely on both these premises; it refers to a source of law (the norms of customary international law) that has no sovereign authority behind it, and it grants the federal courts common-lawmaking authority to fashion general rules relating to that "law."

In contrast to the "federal general common law" that was repudiated in *Erie*, there is a modern, limited form of federal common law. But this modern federal common law does not support the creation of a body of international human rights tort law. To the contrary, consistent with *Erie*'s pronouncement that federal courts are powerless to apply law not derived from a sovereign source, modern federal common law applies only where necessary to further "a genuinely identifiable (as opposed to judicially constructed) federal policy." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 89 (1994); *cf. D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 472 (1942) (Jackson, J., concurring) (observing that "[f]ederal common law implements the federal Constitution and statutes, and is conditioned by them"). Thus, this Court has held that federal common law will displace non-federal law only where there is both an identifiable "uniquely federal interest" and a "significant conflict" between that interest and the operation of the non-federal law. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988).

There exists no identifiable uniquely federal interest in tort disputes arising out of the mistreatment of foreign citizens by their own governments or by their fellow citizens within their own countries. Even if there were such an interest, moreover, it is difficult to see how it would significantly conflict with, so as to preempt completely, the application of local law to such disputes. *See id.* at 508 (explaining that federal common law applies only to those particular elements of a claim that are in conflict with the

federal interest). Indeed, to the extent there is any identifiable federal policy with respect to individual human rights under international law, it counsels *against* the creation of a private right of action enforceable in federal court, as demonstrated by this Court's holding in *Banco Nacional de Cuba v. Sabbatino*.

In *Sabbatino*, this Court held that modern federal common law requires the application of the act-of-state doctrine as a federal law *defense* against claims challenging the conduct of foreign governments under international law. *Id.* at 421. In doing so, the Supreme Court made clear that the act-of-state doctrine had "'constitutional' underpinnings," and originated not in international law but in constitutional separation of powers principles that counseled against judicial intervention in foreign affairs. *Id.* at 422-24; *see also Restatement (Third) Foreign Relations Law of the United States* § 443 cmt. a & n.1 ("no rule of international law requires application of the act of state doctrine"). Thus, despite some broad dictum in *Sabbatino* concerning the application of modern federal common law to issues of international law, it is clear that this Court did not endorse the federalization of every common-law tort that happened also to be a human rights violation. To the contrary, in holding that the act-of-state doctrine prevented a plaintiff from bringing claims for torts alleged to violate international human rights law, the Court in *Sabbatino* "declared the ascertainment and application of international law beyond the competence of the courts of the United States," 376 U.S. at 439 (White, J., dissenting), and "did not consider international law to be part of the law of the United States in the sense that United States courts must find and apply it as they would have to do if international legal rules had the same status as other forms of United States law," Harold G. Maier, *The Authoritative Sources of Customary International Law in the United States*, 10 Mich. J. Int'l L. 450, 463 (1989).

IV. THE INCORPORATION OF INTERNATIONAL HUMAN RIGHTS NORMS INTO FEDERAL LAW WOULD SERIOUSLY UNDERMINE DOMESTIC FEDERALISM AND SEPARATION OF POWERS

The briefs of Petitioner, his other *amici* and the United States persuasively explain why affirmance of the decision below would have serious adverse consequences for both the political branches' ability to conduct foreign affairs (including the war on terror) and the ability of U.S. corporations to do business abroad, particularly in remote or unstable areas that require security protection. This Court should not, however, lose sight of the drastic *domestic* implications of its decision in this case.

Although the focus of international human rights litigation to date has been on abuses committed by and in foreign nations, *see supra* pp. 4-5, there is nothing in the doctrines developed by the lower courts that would limit the application of the Alien Tort Statute to such situations. To the contrary, the entire premise of the modern conception of customary international law is that the rules protect individuals from human rights abuses committed by their own governments and countrymen and in their own countries. *See supra* pp. 4-5. Accordingly, any federal right of action to enforce international "law" generally (as opposed to a narrowly drawn congressional enactment such as the TVPA, *see supra* note 3) would necessarily govern the domestic conduct of state and federal officials. In other words, if U.S. law provides a cause of action for human rights abuses committed in *Mexico*, then it necessarily authorizes a cause of action for the same human rights abuses committed in *New Mexico*.[9]

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[9] The class of plaintiffs eligible to bring human-rights claims against domestic officials would vary depending on which of the lower courts' theories were adopted. Under the Ninth Circuit's view that the Alien Tort Statute creates a statutory right of action, that right of action would be limited by the express terms of the statute, which applies only to alien plaintiffs. By contrast, under the Second Circuit's more expansive view that claimed violations of customary international law arise under federal common law, such claims could be brought by any plaintiff pursuant to the general federal-question jurisdictional statute, 28 U.S.C. § 1331. *See supra* note 5. In either event, the adverse domestic consequences discussed herein would be significant.

Under the current legal regime, plaintiffs with grievances against state or federal officials may bring federal claims under the Civil Rights Act of 1871, 42 U.S.C. § 1983, or the *Bivens* doctrine. If this Court were to recognize claims for customary international law violations, then in many, if not most, cases involving allegations of civil rights violations or police misconduct, plaintiffs will demand, and the courts will be required to perform, a second layer of review, testing the official action not only against the strictures of the U.S. Constitution and federal law, but also against the prevailing standards of customary international law. Such review — in addition to altering the balance of power between the States and the federal government and between the courts and the political branches — will likely impose a significant burden on both courts and litigants. *See Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 154 (2d Cir. 2003) ("the relevant evidence customary international law is widely dispersed and generally unfamiliar to lawyers and judges").

In addition to imposing additional restrictions on the conduct of government officials in their law enforcement and other duties, customary international human rights norms, if found to be a part of federal law, could be used as an end run around this Court's decisions limiting the scope of federal authority. For example, the Court has held that the federal government lacks the constitutional authority to authorize federal remedies for local acts of gender-motivated violence.

See United States v. Morrison, 120 S. Ct. 1740 (2000). However, the documents and institutions that are the sources for customary international law suggest that freedom from gender-motivated violence is, or is evolving into, an international human rights norm. *See Brief of Amici Curiae on Behalf of the International Law Scholars and Human Rights Experts in Support of Petitioners, United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29), 1999 WL 1037253 (cataloging such sources). If this is so, then a federal cause of action of the sort invalidated in *Morrison* would nevertheless be viable under federal law. Indeed, a number of commentators have urged just such a result. *See, e.g., id.*; Mary Ann Case, *Reflections on Constitutionalizing Women's Equality*, 90 Calif. L. Rev. 765, 774 n.56 (2002). Similarly, given that various sources of international human-rights norms address freedom of religion, *see* Morley, *supra*, at 116 & nn.40-41 (cataloging such sources), the incorporation of those norms into federal law could require courts to enforce limitations on state action affecting religious activity similar to those that the Court invalidated, as exceeding the scope of Congress's powers, in *City of Boerne v. Flores*, 521 U.S. 507 (1997).

The incorporation of customary international human rights norms into federal law would also inevitably lead to unwarranted federal-court interference with the several States' criminal justice systems, including, for example, the ability of the States to impose punishments such as the death penalty. Under federal law, the outer boundaries of a State's power to impose punishment for criminal activity are delineated by the Eighth Amendment, and may not be further infringed upon by the national government. Yet, if the human-rights norms of the international community are incorporated into U.S. law, then a judicial determination that certain punishments violate those norms would prohibit the States from imposing them, regardless of how widespread their domestic acceptance. Indeed, many international law scholars have argued that the death penalty (or at least

certain applications of it) violates customary international law, *see, e.g.*, Julian S. Nicholls, Comment, *Too Young to Die: International Law and the Imposition of the Juvenile Death Penalty in the United States*, 5 Emory Int'l L. Rev. 617, 651-52 (1991) (arguing that the juvenile death penalty violates federal common law); Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 Duke L.J. 485, 489-90, 514, 533-34 (2002) (collecting arguments that the imposition of the death penalty on persons under the age of eighteen violates customary international law), and challenges to the death penalty based on international human rights norms have already been brought in the federal courts, *see, e.g., Hain v. Gibson*, 287 F.3d 1224, 1242-44 (10th Cir. 2002), *cert. denied*, 537 U.S. 1173 (2003); *Beazley v. Johnson*, 242 F.3d 248, 263-68 (5th Cir. 2001).

These examples are just the tip of the iceberg. Scholars and commentators have argued that international law protects, or may soon protect, rights relating to an incredibly broad range of topics, including, in addition to those discussed above, education, employment, property, environmental protection and sexual orientation. *See* Bradley & Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, *supra*, 110 Harv. L. Rev. at 841 & nn.170-71 (1997) (providing examples of such arguments); Morley, *supra*, at 117 (explaining that "[e]xisting international agreements cover almost every imaginable aspect of society, including marriage, juvenile justice, and education" (footnotes omitted)). A decision endorsing the incorporation of customary international law into federal law thus has the potential to federalize vast expanses of areas that are now within the realms of state self-government.

The use of international human rights norms to regulate local activity is particularly troublesome because of the nature of modern international law. Despite the sources of international law set forth in *Filartiga* and the Restatement,

there is neither an authoritative arbiter of international law nor an objective method for determining the norms incorporated therein, making international human rights law necessarily indeterminate. *See, e.g.*, *Flores*, 343 F.3d at 154 (describing customary international law's "soft, indeterminate character"); Christopher A. Ford, *Adjudicating Jus Cogens*, 13 Wis. Int'l L.J. 145, 165 (1994) ("Apart . . . from the comparatively uncontroversial genocide and slavery prohibitions—which still have their doctrinal critics—nothing approaching a general consensus has developed regarding the substantive content of peremptory international law" (footnote omitted)). International law "evolves," moreover, on the basis of the views of entities, such as domestic and foreign jurists, foreign and transnational courts and treaty-making bodies, that are neither representative of the American political community nor responsive to it. Under these circumstances, the potential for anti-democratic judicial activism in connection with the creation of a federal common law of international law cannot be overstated. As Judge Randolph recently observed in arguing that courts are unauthorized to exercise a "free-wheeling judicial power" to apply international law:

> The political branches of our government may influence but they by no means control the development of customary international law. To have federal courts discover it among the writings of those considered experts in international law and in treaties the Senate may or may not have ratified is anti-democratic and at odds with principles of separation of powers.

Al Odah, 321 F.3d at 1148 (Randolph, J., concurring); *see also Tel-Oren*, 726 F.2d at 827 (Robb, J., concurring) (arguing that the courts "ought not serve as debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations").

Judicial interpretation is difficult and divisive enough when it is based on the Constitution and the laws enacted by Congress. Were federal courts authorized to pass judgment on official action based on a State's compliance with "international" or foreign norms, fundamental principles of judicial restraint, separation of powers and federalism would be subverted. Whether Congress could even authorize such a regime through an unambiguous statutory pronouncement is itself a serious question going to the heart of our constitutional structure. To permit the courts to authorize it, either based on a once-obscure jurisdictional statute or, even more radically, without any congressional authorization at all, is a step that this Court should firmly reject.

CONCLUSION

For the reasons set forth above, this Court should reverse the decision below and hold that the neither the Alien Tort Statute nor the "common law of the United States" provides a private right of action for violations of international human rights law.

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